Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(A)-1017–05 OF 2017
ABDUL RAHMAN SEBLI, ZALEHA YUSOF AND MARY LIM JJCA
5 DECEMBER 2018

Statutory Interpretation — Subordinate legislation — Conflicting provisions in subsidiary legislation — Regulations governing conduct and discipline of local authority employees made pursuant to s 17(1) of the Local Government Act 1976 ('the LGA') — Regulation 29(1) required employee to be given right to be heard before he was dismissed whilst reg 25(2)(a) removed that right if he had been convicted of an offence – Whether conflict between the two regulations had to be resolved in favour of the employee — Whether reg 29(1) being consonant with s 16(4) of the LGA prevailed whereas reg 29(1) being inconsistent with s 16(4) was void to the extent of the inconsistency — Interpretation Acts 1948 and 1967 s 23(1)

The respondent was dismissed from employment as a security guard with the second appellant ('A2') after A2 discovered that he was convicted and fined by a magistrate's court for an offence under the Minor Offences Act 1955. Following an investigation into the respondent's conviction by a committee under the Public Officers (Conduct and Discipline) Municipal Council of the Province of Wellesley Regulations 1995 ('the 1995 Regulations'), the first appellant ('A1') decided to terminate the respondent's employment 'in the public interest' in accordance with reg 50 of the 1995 Regulations. This form of termination entitled the respondent to receive his full pension and retirement benefits. However, when the respondent rejected A1's decision, the latter revoked its decision and replaced it with a bare order of dismissal under reg 39(g) of the 1995 Regulations which denied the respondent of any benefits. The respondent successfully applied to the High Court to quash A1's decision. The central question in the instant appeal against the High Court's verdict was whether the respondent should have been given a right to be heard before he was dismissed in the light of two conflicting provisions on that point in the 1995 Regulations. Whilst s 16(4) of the Local Government Act 1976 ('the LGA') and reg 29(1) of the 1995 Regulations required that the respondent should have been given an opportunity to be heard, that right was denied to him by reg 25(2)(a) 'on the ground of conduct in respect of which a criminal charge has been proved against him'. The appellants argued that reg 25(2)(a) should override reg 29(1) and s 16(4) because it was made by A2 pursuant to s 17(1) of the LGA with the approval of the state authority for the specific

purpose of maintaining good conduct and discipline among A2's officers and employees.

Held, dismissing the appeal and affirming the High Court's decision:

(1) In a situation of statutory conflict as in the present case, a construction that favoured the employee had to be given, more so where the employee's livelihood was at stake. The respondent had to be given the benefit of s 16(4) of the LGA and reg 29(1) of the 1995 Regulations which accorded him a right to be heard, rather than to subject him to the provisions of reg 25(2)(a) which denied him of that right. It was mandatory for the appellants to have served a show-cause notice on the respondent and afforded him a reasonable opportunity of being heard. Their failure to do so rendered the decision to dismiss him unsustainable in law (see paras 42 & 48).

(2) A subsidiary legislation could not be inconsistent with, let alone override, an Act of Parliament. Regulation 25(2)(a) was therefore void vis a vis s 16(4) of the LGA — see s 23(1) of the Interpretation Acts 1948 and 1967 (see para 33).

(3) Nothing in s 16(4) of the LGA stated that it was to be read subject to (or that it was 'dependent upon') s 17(1) of the LGA or to any regulation made thereunder. The Legislature would have said so if it had so intended (see para 41).

(4) Regulation 25(2)(a), which circumscribed an employee's right to be heard, could not be construed as overriding or nullifying reg 29(1) to the detriment of the respondent. It was untenable for the appellants to argue that reg 25(2)(a) took precedence over reg 29(1) as both those regulations were made under the same section of the LGA, namely s 17(1). The fallacy in the appellant's argument lay in the fact that it could equally be argued that reg 29(1) should prevail over reg 25(2)(a) as it provided in unequivocal language and without qualification that the employee was to be accorded a right to be heard before he was dismissed from employment. It was relevant to note that reg 29(1) came after reg 25(2)(a) (see paras 43–45).

[Bahasa Malaysia summary

Responden diberhentikan dari pekerjaan sebagai pengawal keselamatan dengan perayu kedua ('A2') selepas A2 mendapati bahawa dia telah disabitkan dan didenda oleh mahkamah majistret untuk kesalahan di bawah Akta Kesalahan-Kesalahan Kecil 1955. Berikutan penyiasatan terhadap sabitan responden oleh sebuah jawatankuasa di bawah Peraturan Pegawai Awam (Kelakuan dan Tatatertib) di Majlis Perbandaran Wilayah Wellesley 1995 ('Peraturan 1995'), perayu pertama ('A1') membuat keputusan untuk memberhentikan kerja responden 'demi kepentingan umum' mengikut

peraturan 50 Peraturan 1995. Bentuk perberhentian ini memberi hak kepada responden untuk menerima pencen penuh dan faedah persaraannya. Walau bagaimanapun, apabila responden menolak keputusan A1, yang terkemudian membatalkan keputusannya dan menggantikannya dengan perintah perberhentian di bawah peraturan 39(g) Peraturan 1995 yang menafikan responden dengan apa-apa faedah. Responden berjaya memohon kepada Mahkamah Tinggi untuk membatalkan keputusan A1. Persoalan utama dalam rayuan ini terhadap keputusan Mahkamah Tinggi ialah sama ada responden sepatutnya diberi hak untuk didengar sebelum dia diberhentikan dalam dua peruntukan yang bercanggah pada ketika itu dalam Peraturan 1995. Walaupun s 16(4) Akta Kerajaan Tempatan 1976 ('LGA') dan peraturan 29 (1) Peraturan 1995 menghendaki responden sepatutnya diberi peluang untuk didengar, hak itu dinafikan kepadanya mengikut peraturan 25(2)(a) 'atas alasan kelakuan yang berkenaan dengan pertuduhan jenayah telah dibuktikan terhadapnya'. Perayu berpendapat bahawa peraturan 25(2)(a) sepatutnya mengatasi peraturan 29(1) dan s 16(4) kerana ia dibuat oleh A2 menurut s 17(1) LGA dengan kelulusan pihak berkuasa negeri untuk tujuan khusus untuk mengekalkan kelakuan dan disiplin yang baik di kalangan pegawai dan pekerja A2.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Dalam situasi konflik undang-undang seperti dalam kes ini, tafsiran yang menyebelahi pekerja perlu diberikan, lebih-lebih lagi di mana kepentingan pekerja dipertaruhkan. Responden perlu diberi kepentingan s 16(4) LGA dan peraturan 29(1) Peraturan 1995 yang memberikan hak kepadanya untuk didengar, dan bukannya mengkehendakinya kepada peruntukan peraturan 25(2)(a) yang menafikan hak itu. Ia adalah wajib bagi perayu-perayu untuk menyampaikan notis petunjuk sebab kepada responden dan memberikannya peluang yang munasabah untuk didengar. Kegagalan mereka berbuat demikian menyebabkan keputusan untuk memberhentikan dia tidak boleh dikekalkan dalam undang-undang (lihat perenggan 42 & 48).

(2) Perundangan subsidiari tidak boleh tidak konsisten dengan, apatah lagi, suatu Akta Parlimen. Oleh itu, peraturan 25(2)(a) adalah tidak sah berbanding s 16(4) LGA — lihat s 23(1) Akta Tafsiran 1948 dan 1967 (lihat perenggan 33).

(3) Tiada apa-apa dalam s 16(4) LGA menyatakan bahawa ia dibaca tertakluk kepada (atau ia 'bergantung kepada') s 17(1) LGA atau kepada mana-mana peraturan yang dibuat di bawahnya. Badan perundangan akan berkata demikian jika ia dimaksudkan (lihat perenggan 41).

(4) Peraturan 25(2)(a), yang membataskan hak pekerja untuk didengar,

tidak boleh ditafsirkan sebagai mengatasi atau membatalkan peraturan 29(1) untuk menjejaskan responden. Tidak boleh dipertahankan bagi perayu untuk berhujah bahawa peraturan 25(2)(a) mengambil keutamaan ke atas peraturan 29(1) kerana kedua-dua peraturan tersebut dibuat di bawah seksyen LGA yang sama iaitu s 17(1). Kesalahan dalam hujah perayu terletak pada hakikat bahawa ia boleh dikatakan sama ada peraturan 29(1) harus mengatasi peraturan 25(2)(a) sebagaimana yang diperuntukkan dalam bahasa yang nyata dan tanpa batas bahawa pekerja itu akan diberikan hak untuk didengar sebelum dia diberhentikan dari pekerjaan. Adalah relevan untuk mengambil perhatian bahawa peraturan 29(1) datang selepas peraturan 25(2)(a) (lihat perenggan 43–45).]

Notes

For cases on subordinate legislation in general, see 11(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2427–2457.

Cases referred to

Datin Azizah bte Abdul Ghani v Dewan Bandaraya Kuala Lumpur & Ors and another appeal [1992] 2 MLJ 393, SC (refd)

Kerajaan Malaysia v Wong Pot Heng & Anor [1997] 1 MLJ 437, FC (refd)

M Sentivelu a/l R Marimuthu v Public Services Commission Malaysia & Anor [2005] 5 MLJ 393, CA (refd)

Mamat bin Talib (Timbalan Ketua Polis, Johor) & Anor v Abdul Jalil bin Rashid [2006] 2 MLJ 108; [2005] 4 CLJ 892, CA (refd)

Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased) [2008] 6 MLJ 1, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

Subramanian a/l Sannasy v SAC II Syed Alwi bin Syed Hamid & Anor [2004] 4 MLJ 415, HC (refd)

Legislation referred to

Federal Constitution arts 132(1), 135(2)

Interpretation Acts 1948 and 1967 s 23(1)

Local Government Act 1976 ss 16(4), 17(1)

Minor Offences Act 1955

Public Officers Majlis Perbandaran Seberang Perai (Conduct and Discipline) Municipal Council of Province of Wellesley Regulations 1995 regs 25(2)(a), 29(1), 34, 38, 39, 39(g), 50

Appeal from: Application for Judicial Review No 25–84–12 of 2015 (High Court, Pulau Pinang)

Karin Lim (Murugan a/l D Maniam and Cyrus Lim Kia Chun with her) (Presgrave & Matthews) for the appellants.
Selvarani a/p Naramasivoo @ S Paramasivam (Selvarani Naramasivoo & Co) for the respondent.

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] This appeal was against the decision of the High Court allowing the respondent's application for judicial review against the decision of the first appellant dismissing the respondent from the employment of the second appellant. We dismissed the appeal by a unanimous decision and these are our grounds.

[2] The appeal concerns the effect of two conflicting provisions in a subsidiary legislation on the right of an employee of a local authority to be heard before he is dismissed from his employment.

[3] The facts as outlined by the learned judge are not in dispute and they are as follows, with the necessary modifications. The respondent was employed by the second appellant as a Grade KP11 security guard with effect from 2 January 2008. He was promoted to the post of senior security guard Grade KP14 on 1 October 2011.

[4] Unknown to the second appellant, on 3 May 2010 the respondent was arrested by the police for being in unlawful possession of property (the source of which was unknown) under the Minor Offences Act 1955 ('the MOA').

[5] On 6 May 2010, the respondent was charged and he pleaded guilty to the offence in the magistrates court at Bukit Mertajam and was fined RM600. He paid the fine. According to the respondent, he had informed his superior officer, one Hazani bin Omar, of his plea of guilt and payment of the fine of RM600 in the afternoon of 6 May 2010 itself and that no action was taken against him by the second respondent in connection with the case.

[6] There is no record however in the office of the respondent's head of department to show that the respondent had notified or informed his office of his conviction on 6 May 2010. The appellants' case was that they had no knowledge of the respondent's conviction.

[7] Four years later in October 2014, the Yang di-Pertua of the second appellant received an anonymous letter pertaining to the respondent's involvement in the crime resulting in his conviction by the Bukit Mertajam Magistrates Court.

[8] Accordingly, an investigation was carried out by the head of management services of the second appellant. The second appellant wrote two letters, one dated 18 September 2004 and the other dated 24 October 2004 to the Bukit Mertajam Magistrates Court to obtain information on the crime allegedly committed by the respondent.

[9] The Bukit Mertajam Magistrates Court vide letter dated 30 October 2004 confirmed the respondent's conviction under the MOA. As a result, the second appellant set up an internal investigation committee ('the IIC') to investigate the allegation in the anonymous letter.

[10] The IIC is an administrative committee established under the Public Officers Majlis Perbandaran Seberang Perai (Conduct and Discipline) Municipal Council of Province of Wellesley Regulations 1995 ('the 1995 Regulations') before any disciplinary action is instituted against any officer or employee of the establishment.

[11] The IIC carried out its investigation on 10 October 2014 and 15 October 2014, including a hearing on 17 October 2014 at which hearing the respondent admitted to having committed the offence he was charged with on 6 May 2010. He also admitted to concealing the information from the second appellant.

[12] Thereafter the IIC forwarded its report on the investigation to the Yang Di-Pertua of the second appellant. The second appellant then sent a report pursuant to reg 34 of the 1995 Regulations by memo dated 26 December 2014 to the first appellant.

[13] On 17 February 2015, the second appellant submitted a paper to the first appellant to consider the appropriate punishment to be imposed on the respondent. The first appellant adjourned its consideration and requested for the submission of a performance appraisal report of the respondent from the second appellant, which report was submitted to the first appellant by the second appellant on 9 March 2015.

[14] On 24 April 2015, the second appellant submitted another paper to the first appellant to consider the appropriate punishment to be imposed on the respondent pursuant to regs 34, 38 and 39 of the 1995 Regulations.

[15] At the meeting on 25 May 2015, the first appellant resolved to terminate the respondent's employment 'in the public interest' with effect from 2 October 2015.

[16] Accordingly, the first appellant sent a letter dated 19 June 2015 to the respondent to terminate his employment in accordance with reg 50 of the 1995 Regulations, ie in the public interest. The respondent was required to submit certain documents for the purposes of calculating his pension and other retirement benefits.

[17] By letter dated 26 June 2015, the respondent rejected the decision of the first appellant to terminate his employment in the public interest. Through his solicitor's letter dated 19 August 2015, the respondent notified the second appellant of his dissatisfaction with the termination of his employment.

[18] Following the respondent's rejection of his termination in the public interest, on 3 September 2015 the secretariat of the first appellant submitted a paper to the first appellant to revoke the first appellant's decision to terminate the respondent's employment in the public interest. On the same date, it also prepared another working paper on the appropriate punishment to be imposed on the respondent.

[19] At the meeting on 4 September 2015, the first appellant decided to revoke the termination of the respondent's employment in the public interest with immediate effect. The respondent was notified by the second appellant of this decision by letter dated 4 September 2015. The revocation letter reads:

> PEMBATALAN PENAMATAN DEMI KEPENTINGAN AWAM
>
> Pihak Berkuasa Tatatertib, Majlis Perbandaran Seberang Perai di dalam mesyuaratnya yang ke-8/2015 pada 04 September, 2015, memutuskan Penamatan Demi Kepentingan Awam terhadap tuan sebelum ini melalui surat rujukan Bil(87) dlm MPSP/10(P)9-82/35(SULIT) bertarikh 19 Jun 2015 adalah dibatalkan berkuatkuasa serta-merta.

[20] By a letter of even date, the respondent was informed that he was dismissed in accordance with reg 39(g) of the 1995 Regulations (as opposed termination in the public interest decided earlier). The letter reads:

> 2. Sehubungan itu Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai di dalam mesyuaratnya yang ke – 8/2015 pada 04 Serptember 2015 adalah menimbang dengan teliti fakta kes dan kesalahan yang dilakukan oleh tuan, memutuskan bahawa tuan dengan ini dikenakan hukuman berikut mengikut Peraturan 39, Peratutan-Peraturan Pegawai Awam Majlis Perbandaran Seberang Perai (Kelakuan & Tatatertib) 1995.
>
> 39(g) Buang Kerja
>
> Hukuman adalah berkuatkuasa mulai tarikh penerimaan surat ini. Sila tuan akui penerimaan surat ini dengan menandatangani Surat Akuan Terima yang disertakan dan dikembalikan.

[21] Thus, instead of termination of service in the public interest with full pension and retirement benefits, which the respondent rejected and which the first appellant revoked, the respondent was now dismissed with no such benefits. A

[22] Dissatisfied with the decision, the respondent applied for judicial review to quash the decision. His application was allowed by the High Court, hence the present appeal by the appellants. The orders that he had sought, inter alia, were the following: B

(a) an order of certiorari to quash the decision of the first and second appellants given by letter dated 4 September 2015 and received by him on 10 September 2015; C

(b) a declaration that his dismissal was null and void, not effective and to be be set aside, and that he was to maintain his status quo in his original post as senior security guard ('pengawal keselamatan kanan') Grade KP14 with all benefits; and D

(c) damages.

[23] There is no dearth of authority on the principle of law relating to judicial review, amongst them the following cases referred to by the learned judge in his grounds of judgment: *Mamat bin Talib (Timbalan Ketua Polis, Johor) & Anor v Abdul Jalil bin Rashid* [2006] 2 MLJ 108; [2005] 4 CLJ 892; *M Sentivelu a/l R Marimuthu v Public Services Commission Malaysia & Anor* [2005] 5 MLJ 393; *Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1; *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Datin Azizah bte Abdul Ghani v Dewan Bandaraya Kuala Lumpur & Ors and another appeal* [1992] 2 MLJ 393; *Kerajaan Malaysia v Wong Pot Heng & Anor* [1997] 1 MLJ 437; *Subramanian a/l Sannasy v SAC II Syed Alwi bin Syed Hamid & Anor* [2004] 4 MLJ 415. E F G

[24] These cases may not be exactly on point as they are not cases dealing with a situation where the dismissal of the employee was based on his conviction of a criminal offence as in the appeal before us but the general principles on the right of hearing discussed in those cases are still relevant and applicable. H

[25] It was common ground that the respondent was not given the opportunity of being heard before he was dismissed by the appellants. This is clear from the affidavits affirmed by the respondent and the appellants during the judicial review application. I

[26] Nor was it disputed that the respondent did not receive any warning, suspension, show cause letter or any letter from the appellants before he was dismissed from his employment. So, the question whether or not the respondent was given a right of hearing before he was dismissed did not arise for the High Court's consideration, nor for our consideration in the present appeal.

[27] The failure by the appellants to give the respondent a reasonable opportunity of being heard was in clear breach of s 16(4) of the Local Government Act 1976 ('the LGA') and reg 29(1) of the 1995 Regulations, both of which encapsulate the common law concept of audi alteram partem (hear the other side). For ease of reference we reproduce below s 16(4) of the LGA and reg 29(1) of the 1995 Regulations:

Section 16(4) of the LGA

> (4) The Commissioner of the City of Kuala Lumpur in the case of the Federal Territory, or the Mayor or President or his representative who shall be a Councillor, the Secretary and one other Councillor in the case of other local authorities, may appoint such persons to the offices shown on the list so approved and may reduce in rank or dismiss such persons from office and may appoint others in their stead:
>
> Provided that the reduction in rank or dismissal from office of any Head of Department or his Deputy shall not take effect until such reduction in rank or dismissal has been confirmed by the State Authority:
>
> Provided further that no officer or employee shall be reduced in rank or dismissed without being given a reasonable opportunity of being heard.

Regulation 29(1) of the 1995 Regulations

> 29(1) The Disciplinary Authority sitting to consider a case where the breach of discipline complained of has been found to be of a nature which merits a punishment of dismissal or reduction in rank shall consider all the available information and where it appears that there is a prima facie case against the officer for dismissal or reduction in rank, the Disciplinary Authority shall direct that a statement containing the facts of the breach of discipline alleged to have been committed by the officer and any proposed ground on which the officer is to be dismissed or reduced in rank be sent to the officer and shall call upon him to make a written representation, containing the grounds upon which he relies to exculpate himself, within a period of not less than twenty-one days the date of receipt of the charge.

[28] Despite the clear provisions of s 16(4) of the LGA and reg 29(1) of the 1995 Regulations, learned counsel for the appellants contended that it was not a legal requirement for the respondent to be given a right of hearing, citing sub-reg 25(2)(a) of the 1995 Regulations. For context, we reproduce below both sub-reg (1) and sub-reg (2) of reg 25:

(1) Subject to the provision of sub-regulation (2), no officer shall be dismissed or reduced in rank in any disciplinary proceedings under this Part unless he has been informed in writing of the grounds on which it is proposed to take action against him and has been afforded a reasonable opportunity of being heard.

(2) Sub-regulation (1) shall not apply in the following cases —

(a) where an officer is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him;

[29] Sub-regulations 25(2)(a) of the 1995 Regulations appears, on the face of it, to support the appellants' contention that there was no need for the disciplinary authority to give the respondent a right of hearing as a criminal charge had been proved against him. To fortify her argument, learned counsel for the appellants referred us to art 135(2) of the Federal Constitution ('the Constitution') which provides as follows:

(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:

Provided that this Clause shall not apply to the following cases:

(a) where a member of such a service is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him;

[30] The question for our determination was whether reg 25(2)(a) of the 1995 Regulations read in conjunction with s 17(1) of the LGA and art 135(2) of the Federal Constitution nullified the respondent's right to be heard accorded to him by s 16(4) of the LGA and reg 29(1) of the 1995 Regulations.

[31] There can be no argument that reg 25(2)(a) of the 1995 Regulations is in conflict with both s 16(4) of the LGA and reg 29(1) of the 1995 Regulations. Whilst the latter two provisions provide for a right of hearing before an employee is dismissed from his employment, the former provides for the complete opposite. This is a classic case of the left hand taking away what the right hand has given.

[32] On behalf of the appellants, the main plank of learned counsel's argument was that s 16(4) of the LGA must be read subject to reg 25(2)(a), which was made under s 17(1) of the LGA. Counsel went so far as to argue that s 16(4) is 'dependent' on s 17(1). What counsel meant to say, for all intents and purposes, was that having regard to the provisions of s 17(1) of the LGA, reg 25(2)(a) of the 1995 Regulations overrides not only reg 29(1) but also s 16(4) of the LGA.

[33] To this argument, we need only say that a subsidiary legislation cannot be inconsistent, let alone override an Act of Parliament. Regulation 25(2)(a) of the 1995 Regulations is therefore void vis a vis s 16(4) of the LGA, which is an Act of Parliament: see s 23(1) of the Interpretation Acts 1948 and 1967 which provides:

> (1) Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency.

[34] This provision was dealt with by the Supreme Court in *Datin Azizah bte Abdul Ghani* where Abdul Hamid Omar LP delivering the judgment of the court said at pp 398–399:

> In our view it is a settled policy of the legislature that an Act of Parliament lays down the general principles of the law and to delegate to subordinate authorities the power of making rules for the purpose of settling administrative details and of providing the necessary procedures for giving effect to the general principles of the Act. When, therefore, an Act of Parliament enables an authority to make regulations, a regulation which is validly made under the Act, must be regarded as though it were itself an enactment. But any rule made under an Act of Parliament cannot be intended to override the specific provisions of the Act itself. Under ss 23 and 87 of the Interpretation Acts 1948 and 1967 (Act 388), any rule which is inconsistent with an Act of Parliament is void to the extent of the inconsistency.

[35] Section 17(1) of the LGA stipulates as follows:

> (1) A local authority may, with the approval of the State Authority, from time to time make rules for the purpose of maintaining good conduct and discipline among officers and employees, and may impose any punishment upon any such officer or employee who is guilty of misconduct or breach of duty in the exercise of his official functions:
>
> Provided that no punishment shall be imposed on any Head of Department or his Deputy without the prior approval of the State Authority.

[36] Learned counsel for the appellants was right of course in pointing out that reg 25(2)(a) was a rule that was made by the second appellant under s 17(1) of the LGA with the approval of the State Authority and for the purpose specified in s 17(1), namely:

> for the purpose of maintaining good conduct and discipline among officers and employees.

[37] It was further submitted by learned counsel for the appellants that s 16(4) of the LGA is a general provision, and being a general provision, it must give way to s 17(1) under which reg 25(2)(a) was made by the local authority for the specific purpose of maintaining good conduct and discipline among

officers and employees of the second appellant.

[38] Before we delve further into the conflict between regs 25(2)(a) and 29(1) of the 1995 Regulations, we think it is appropriate at this juncture to deal straight away with art 135(2) of the Constitution which learned counsel for the appellants relied on for her proposition that since the respondent had been convicted of a criminal offence, he had no right to be heard before he could be dismissed from his employment. The basis for the argument was that reg 25(2)(a) of the 1995 Regulations is 'similar in context' to art 135(2) of the Constitution.

[39] With due respect to learned counsel, we must say at the outset that her reliance on art 135(2) of the Constitution was misconceived. First of all, it was common ground that the respondent is not a public servant under art 132(1) of the Constitution. This was acknowledged by the appellants themselves through learned counsel's submission as follows:

> Article 135(2) of the Federal Constitution does not apply to employees or officers of Local Authorities as service in the Local Authorities does not come within Clause 1 of Article 132 of the Federal Constitution.

[40] It was therefore not open to the appellants to now say otherwise. They cannot be allowed to approbate and reprobate on the issue. Furthermore, it was not the appellants' position, nor was it their pleaded case that reg 29(1) of the 1995 Regulations is ultra vires ss 16(4) and 17(1) of the LGA, or art 135(2) of the Constitution and therefore invalid.

[41] Coming back to learned counsel for the appellants' argument that s 16(4) of the LGA must be read subject to s 17(1) of the LGA, we found nothing of substance to the argument. In the first place, s 16(4) does not say that it is subject to s 17(1) or to any regulation made thereunder. The legislature would have said so if it had so intended. In the absence of such qualification, there was no basis for learned counsel to suggest that s 16(4) is subject to s 17(1) or worse, 'dependent' on it.

[42] In our view, in a situation of statutory conflict as in the present case, a construction that favours the employee must be given, more so where the employee's livelihood is at stake. In the context of the present appeal, the respondent must be given the benefit of s 16(4) of the LGA and reg 29(1) of the 1995 Regulations which accord him a right of hearing, rather than to subject him to the provisions of reg 25(2)(a) which denies him of that right.

[43] It is important to bear in mind that both regs 25(2)(a) and 29(1) of the 1995 Regulations were made under the same section of the LGA, ie s 17(1). It

was therefore untenable for the appellants to argue that reg 25(2)(a) must take precedence over reg 29(1) on the ground that it was made for the purpose of maintaining good conduct and discipline among officers and employees of the second appellant.

[44] The fallacy of the argument lies in the fact that it could equally be argued that reg 29(1) prevails over reg 25(2)(a) as it provides, in unequivocal language and without qualification, that the employee is to be accorded a right of hearing before he is dismissed from his employment. in this regard, it is relevant to note that reg 29(1) comes after reg 25(2)(a).

[45] Regulation 25(2)(a) which circumscribes the employee's right of hearing cannot in our view be construed as overriding or nullifying reg 29(1) to the detriment of the respondent. There is, of course, the possible argument that reg 25(2)(a) deals with the specific scenario of a proven criminal charge and that in such a case no reasonable opportunity of being heard as required by reg 29(1) needs to be given, *generalia specialibus non derogant*.

[46] But that, in any event, does not answer our view that it is void for being inconsistent with s 16(4) of the LGA. A void provision has no effect in law. The fact that it is 'similar in context' to art 135(2) of the Constitution as submitted by learned counsel for the appellants is of no consequence if otherwise it is void and has no legal effect.

[47] It is up to the local authority, in this case the second respondent, to rectify the situation if it deems it necessary so to do. Unless and until this is done, it is grossly unfair to deny the respondent of the right of hearing accorded to him by s 16(4) of the LGA and reg 29(1) of the 1995 Regulations.

[48] In the circumstances, we endorse the learned judge's view that it was mandatory for the appellants to serve a show cause notice on the respondent and affording him a reasonable opportunity of being heard as required by reg 29(1) of the 1995 Regulations. Their failure to do so rendered the decision to dismiss the respondent unsustainable in law.

[49] It was for all the reasons aforesaid that we unanimously dismissed the appellants' appeal and affirmed the High Court decision.

Appeal dismissed and High Court's decision affirmed.

Reported by Ashok Kumar